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Supreme Court, U.S.
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No. 90-1848

In the
Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,
PETITIONER,

v.

COMBINED INSURANCE COMPANY
OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent's Brief in Opposition

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Questions Presented.

I. Is the decision of the First Circuit Court of Appeals to bar Petitioner's claim asserted in an earlier proceeding pursuant to pendent jurisdiction when diversity jurisdiction was known and available, yet not asserted, consistent with well-established principles of *res judicata*?

II. Is the issue raised in the present action one of sufficient significance for the Court to grant a writ of *certiorari*?

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Respondent's Brief in Opposition

Statement of the Case.

This case arises from petitioner Carl Kale's (hereinafter "Petitioner" or "Kale") thus-far unsuccessful attempts at claim-splitting. The dismissal of the Complaint that gives rise to Petitioner's writ of *certiorari* represents the second lawsuit

filed by him against respondent Combined Insurance Company of America (hereinafter "Respondent" or "Combined") based on the termination of his employment from Combined.[1]

In his first suit, filed in 1985 in the United States District Court for the District of Massachusetts (hereinafter "*Kale I*"), Petitioner asserted federal question jurisdiction based on an alleged violation of the federal age discrimination statute, 29 U.S.C. §§ 621 *et seq*. Petitioner also asserted two state-law claims, based only on pendent jurisdiction under 28 U.S.C. § 1331, even though on the face of the Complaint diversity jurisdiction under 28 U.S.C. § 1332 was known and available.[2] *See Resp. App.* at A-1.

After extended discovery in *Kale I*, Combined moved to dismiss the federal age claim based in part on Kale's failure to file a timely charge of discrimination with the Equal Employment Opportunity Commission. The District Court (Skinner, J.) granted Combined's motion, and further dismissed "without prejudice" his state law claim "over which there was only pendent jurisdiction."[3] *Pet. App.* at A-35, A-36. Although Petitioner plainly was aware of the availability of diversity as a jurisdictional basis for his state law claim,[4] he made no effort

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[1] Pursuant to Supreme Court Rule 29.1, Combined provides the following information. Its parent is Aon Corporation; Combined also has the following non-wholly-owned subsidiaries: Orient Aon Life Insurance Company, Ltd. (Japan), Oak Brook Holding, Inc. (Delaware), Production Life Insurance Company (Arizona), Oak Brook Life Insurance Company (Arizona) and Oxford Managers, Inc. (Illinois).

[2] Combined has attached as an Appendix to this brief (referred to herein as "*Resp. App.* at ."), copies of the Complaints filed in *Kale I* and *Kale II*, which were included in the Record before the First Circuit.

[3] Petitioner has included various documents in an Appendix to his petition for writ of *certiorari* (referred to herein as "*Pet. App.* at "). Improperly included in the Appendix, however, are several documents that were not part of the Record Appendix before the First Circuit. *See Pet. App.* at A-37, A-39, A-40, A-47.

[4] One of Kale's state law claims (alleged intentional infliction of emotional distress) was dismissed early in the proceedings in *Kale I*. 924 F.2d at 1163; *Pet. App.* at A-2.

to assert that alternate form of jurisdiction nor did he otherwise bring it to the attention of the District Court. Likewise, he neither sought reconsideration of nor appealed the dismissal of his state law claim.[5]

On May 10, 1989, Petitioner filed his second Complaint ("*Kale II*") in Massachusetts state court, alleging seven state law causes of action (including the one state law claim asserted in *Kale I*), all based again on the termination of his employment from Combined. *See Resp. App.* at A-6. Combined removed the case to federal District Court based on diversity jurisdiction, and then filed a "Motion to Dismiss or, In The Alternative, Motion For Summary Judgment." *Pet. App.* at A-21. Combined specifically argued that *res judicata* mandated dismissal of the state law claim originally asserted in *Kale I* since Petitioner could have asserted that claim in *Kale I* had he pleaded a known and available form of jurisdiction, diversity. Combined further argued that *res judicata* barred all of his state law claims since each arose out of the same transaction or occurrence (Kale's termination), and each could have been asserted in *Kale I*.

On May 1, 1990, the District Court (Tauro, J.) granted Combined's motion to dismiss the *Kale II* complaint, ruling that the Petitioner's failure to plead diversity jurisdiction in *Kale I* barred the assertion of his state law claims in *Kale II*. *Kale* v. *Combined Ins. Co. of America*, 736 F. Supp. 1183 (D. Mass. 1990); *Pet. App.* at A-18. The Court agreed with Combined that "not only all legal theories should have been brought in *Kale I*, but also . . . all jurisdictional bases, including diversity jurisdiction." 736 F.Supp. 1186; *Pet. App.* at A-25.

Petitioner thereafter appealed this dismissal to the First Circuit, contending first that Judge Skinner's use of the words "without prejudice" in *Kale I* constituted an express reservation

[5] Petitioner did appeal the dismissal of his federal age discrimination claim in *Kale I* to the First Circuit, which affirmed the District Court's opinion. *See Kale* v. *Combined Ins. Co. of America*, 861 F.2d 746 (1st Cir. 1988).

of his right to maintain a second action; and second, that preclusion of his action constituted an inappropriate "retroactive" application of a new principle of law. The First Circuit (Selya, J.), squarely rejected both arguments and affirmed the District Court's decision, concluding that,

> [Petitioner's] failure to assert diversity jurisdiction when it unarguably existed, and he knew as much, gave the judgment in *Kale I* wide-ranging preclusive effect . . . Because of this, and because the case did not fall within an exception to the normal rules of *res judicata*, Judge Tauro's dismissal order was wholly appropriate.

Kale v. *Combined Ins. Co. of America*, 924 F.2d 1161, 1169 (1st Cir. 1991); *Pet. App.* at A-1, A-17.

Petitioner subsequently filed a petition for rehearing *en banc*, which was denied by the First Circuit on February 26, 1991. *See Kale* v. *Combined*, 924 F.2d at 1169; *Pet. App.* at A-37.

Reasons for Denying the Writ.

INTRODUCTION

The petition for *certiorari* must be denied for two independent reasons: first, the decision of the First Circuit is wholly consistent with well-established principles of *res judicata* and existing authority construing that doctrine; and second, the petition presents an issue of only limited significance.

I. The Decision of the First Circuit Court of Appeals Is Wholly Consistent With Well-Established Principles of Law.

In urging this Court to grant *certiorari*, Petitioner contends that the First Circuit's decision undermines the doctrine of *res judicata* in two respects: first, by failing to give binding effect to the District Court's "without prejudice" dismissal of Petitioner's pendent claim in *Kale I*; and second, by applying the doctrine of *res judicata* to require that a plaintiff plead in his first suit not only all substantive claims, but all forms of jurisdiction. *See Petition* at 7, 17. A consideration of the fundamental principles of *res judicata*, however, demonstrates that both arguments are wholly without merit.

Petitioner also asserts that Combined somehow was precluded from raising *res judicata* as a defense because it failed to appeal Judge Skinner's "without prejudice" dismissal of the state law claim in *Kale I*. This argument was firmly and correctly rejected by the First Circuit in its denial of Petitioner's request for rehearing *en banc*. 924 F.2d at 1169; *Pet. App.* at A-38.[6]

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[6] Without citing any legal authority, Petitioner repeatedly asserts that Combined also somehow either waived or was estopped from raising *res judicata* as a defense since Combined purportedly admitted in oral argument before the First Circuit that it was aware of the existence of diversity, yet failed to call it to the attention of the Court in *Kale I*. *See Petition* at 5, 6, 7, 8, 14, 15, 16, 17. Beyond the fact that this supposed admission is nowhere to be found in the record, it is totally meaningless since it is nothing more than a desperate attempt to shift the blame for Petitioner's failure to assert diversity jurisdiction to someone other than himself. In its Order denying Petitioner's request for rehearing *en banc*, moreover, the First Circuit referred to Petitioner's "new theories, variously characterized in his petition as 'waiver,' 'acquiescence,' and 'estoppel by judgment,' " and held that such theories were foreclosed since the Petitioner "did not make the contentions below . . . did not make them in his appellate briefs . . . did not make them at oral argument . . . [and] did not request leave, after oral argument, to file a supplemental brief." 924 F.2d at 1169; *Pet. App.* at A-38.

A. *The First Circuit Decision is Consistent With Well-Established Principles of Res Judicata.*

1. Judge Skinner's "Without Prejudice" Dismissal of Petitioner's Pendent State Law Claim Was Not An Express Reservation of That Claim.

Petitioner first argues that, by precluding his state law claim in *Kale II*, the First Circuit fails to give binding effect to the "without prejudice" dismissal of his state law claim in *Kale I*, thus undermining the doctrine of *res judicata*.[7] He specifically contends that Judge Skinner's use of the words "without prejudice" in dismissing the state law claim in *Kale I* constituted an express reservation of his right to pursue the state law claim in a subsequent proceeding and prevented the dismissal from being preclusive. *Petition* at 10.[8] He contends that by barring his claim in *Kale II*, the First Circuit converted the District Court's "without prejudice" dismissal into a "with prejudice" dismissal, and denied the original language its appropriate preclusive effect.

This argument misses the point, as the heart of Combined's argument is that because Petitioner had the power and ability to preserve his state law claim in *Kale I* by asserting a known and available basis of jurisdiction, *res judicata* bars his later

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[7] Petitioner makes a nonsensical argument, based on an absurd hypothetical, that the First Circuit's decision will seriously limit the doctrine of *res judicata* and create "precedent for undermining every decision of every court everywhere." *Petition at* 12-14.

[8] In support of this proposition, Petitioner cites *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *Risty*, 276 U.S. 567 (1928), *see Petition* at 10 n.10, but fails to mention that the words "without prejudice" in that case were followed by a detailed description of the specific claims the court intended to reserve. The dismissal in *Chicago, Milwaukee* also provided the plaintiff could pursue the reserved claims in a subsequent suit as though the first " 'had not been brought or this decree entered.' " *Id.* at 590. No similarly explicit reservation of claims accompanied Judge Skinner's dismissal in *Kale I*, nor can one be inferred.

attempt to relitigate the same claim. Petitioner thus clings to the words "without prejudice" only in a vain attempt to cure his failure to assert all available bases of federal jurisdiction in his original suit.[9]

Furthermore, there is no sound basis for Petitioner's argument that the words "without prejudice" were intended to preclude Combined from raising a valid defense based upon an otherwise appropriate application of *res judicata*. Indeed, it is much more realistic to assume that Judge Skinner did not even contemplate the issues raised here in dismissing Petitioner's pendent state law claim. As the First Circuit observed, "Judge Skinner's use of the phrase 'without prejudice' was supererogatory, because the dismissal of pendent claims on jurisdictional grounds is always without prejudice." 924 F.2d at 1167; *Pet. App.* at A-13.[10]

In its rejection of Petitioner's argument, the First Circuit held that, "the phrase could not have constituted an express reservation, as Kale had withheld from the judge the very information [the existence of diversity jurisdiction] which would have made such a reservation meaningful." *Id.* It certainly would be a quantum leap to conclude that by declining to exercise pendent jurisdiction over Petitioner's sole state law claim and dismissing the same without prejudice, that Judge

[9] The First Circuit appropriately held this argument represented "an unvarnished attempt to squeeze an elephant's foot into a pony's shoe." 924 F.2d at 1167; *Pet. App.* at A-13.

[10] Petitioner incorrectly asserts that Judge Skinner's use of the words "without prejudice" was "necessary to prevent the dismissal from being preclusive." *Petition* at 12. As the First Circuit correctly observed, "the dismissal of pendent claims on jurisdictional grounds is *always* without prejudice." 924 F.2d at 1167; *Pet. App.* at A-13 (emphasis added). *See* Fed. R. Civ. P. 41(b) ("[u]nless the court in its order for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction . . . operates as an adjudication on the merits"); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726-27 (1966); *Rose* v. *Town of Harwich*, 778 F.2d 77, 79 (1st Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986). The words "without prejudice," therefore, "added nothing to what transpired." *Kale II*, 924 F.2d at 1167; *Pet. App.* at A-14.

Skinner intended to deprive Combined of the defense that Kale failed in his original suit to plead a known and available basis of jurisdiction.

Kale's awareness that diversity jurisdiction was available itself demonstrates that this is not a case where it is unfair to bar his claim. As the First Circuit explained,

> [Petitioner] knew of the existence of diversity jurisdiction in *Kale I* and chose not to assert it. It was this choice — and this choice alone — that led to Judge Skinner's order of dismissal. In short, [Petitioner's] splitting of his claims was voluntary: he had a full and fair opportunity to litigate all his claims in *Kale I*, but declined to avail himself of it.

924 F.2d at 1168; *Pet. App.* at A-16.[11] Indeed, a contrary result not only would be repugnant to the principles underlying *res judicata*, but would be unfair to Combined since it would be forced to defend against a claim that could have been litigated years ago.

The conclusion that Judge Skinner's "without prejudice" dismissal was not intended to bar Combined's otherwise valid *res judicata* defense is further illustrated by the holding in *Sager* v. *Hunter Corp.*, 665 F. Supp. 575 (N.D. Ill. 1986), where a plaintiff initially filed an employment discrimination suit in state court. Pursuant to an agreed order, the case was " 'dismissed for lack of prosecution, *without prejudice* to plain-

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[11] Courts uniformly enforce the *res judicata* bar when claim-splitting is self-induced. *See, e.g., Kimmel* v. *Texas Commerce Bank*, 817 F.2d 39 (7th Cir. 1987) (failure to assert federal question claim in original diversity action barred subsequent suit); *Poe* v. *John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982) (failure to amend federal question suit in timely manner to add state claims precludes separate suit); *Harper Plastics* v. *Amoco Chemical Corp.*, 657 F.2d 939 (7th Cir. 1981) (failure to assert discretionary pendent claims barred a second action); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (same).

tiff's right to file an action in federal court under Title VII . . .'" even though the record reflected that the applicable federal statute of limitations had lapsed. *Id.* at 577 (emphasis supplied). When the plaintiff in *Sager* filed a second action in federal court, he argued that the "without prejudice" dismissal equitably tolled the statute of limitations. The court rejected this argument and held that the "without prejudice" language "[did] not affect the established statutory limitations period" or "foreclose a defendant from invoking a statute of limitations defense in a later action." *Id.* at 581.

Like the defendant's statute of limitations defense in *Sager*, Combined's contention that *res judicata* bars the state law claim asserted in *Kale I* is an independent defense. In both cases, it is apparent from the facts that the lower courts in the initial actions neither contemplated such defenses nor intended to bar defendants from raising them through the courts' invocation of the words "without prejudice."

2. The First Circuit Correctly Applied The Principles Of *Res Judicata* To Bar Petitioner's Claims.

Petitioner also contends that the First Circuit impermissibly broadens the doctrine of *res judicata* by applying it to require that a plaintiff plead in his first suit not only all substantive claims, but all forms of jurisdiction. An examination of the principles underlying the doctrine of *res judicata*, however, demonstrates that application of the rule to the case at bar is wholly consistent with the doctrinal underpinnings of the rule, and that the First Circuit correctly applied it to bar the claims sought to be asserted in *Kale II*.

The applicability of the basic elements of *res judicata* to the case at bar has never been at issue here.[12] The First Circuit

[12] The well-established essential elements of claim preclusion include (1) a final judgment on the merits; (2) an identity of the cause of action; and (3) an

held it was "nose-on-the-face plain that the claims in *Kale II* stemmed from the same transactional hub as the claims previously mounted in *Kale I* . . . defendant's unilateral termination of the plaintiff's employment." 924 F.2d at 1166. Differences between the claims in *Kale I* and *Kale II*, the First Circuit explained, "were differences in the theories of liability and the selection of remedies, not differences in the fundamental cause of action." *Id.* As the elements of claim preclusion were satisfied, Petitioner "had an obligation to cluster his theories of recovery in *Kale I*, by whatever necessary jurisdictional means, or else forever hold his peace." *Id.*

While Petitioner states that he "has no quarrel with authorities that say all related claims must be asserted in one's first lawsuit or lost," *see Petition* at 17, he attempts to distinguish his own case by arguing that to preclude his claim based on his failure to assert diversity jurisdiction is "to treat the jurisdictional basis as part of the substantive claim" when it is " 'black letter law' that substance and procedure are separate." *See Petition* at 17. This argument is not only without legal basis, it contradicts the fundamental principle that *res judicata* precludes claims based on different theories of liability or different statutes when such claims arise from the same transaction or occurrence. There is no reason to treat alternate bases of jurisdiction differently.

This conclusion and the First Circuit's decision, moreover, are consistent with substantial authority applying the principles of *res judicata* in analogous circumstances, and with existing

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identity of parties. *Kale II*, 924 F.2d at 1165; *Pet. App.* at A-8 - A-9. The First Circuit noted that two of the elements are "unarguably" met with respect to Petitioner's claims in *Kale I* and *Kale II*: there was an absolute identity of parties in both actions, and there was a final judgment constituting an adjudication on the merits in *Kale I*. *Id.* The third element, an identity of cause of action, is also present as the claims Petitioner sought to bring in *Kale II* undoubtedly arose out of the same transaction or occurrence as those alleged in the original Complaint. 924 F.2d at 1166; *Pet. App.* at A-9. *See also Resp. App.* at A-2 - A-3; A-6 - A-9.

authority on the precise issue before the Court. *See Kale I*, 736 F. Supp. at 1187; *Pet. App.* at A-28. (preclusion of Petitioner's claim in *Kale I* was a "natural consequence" of the application of basic principles of claim preclusion).

It is well established, for example, that *res judicata* bars relitigation of all claims a plaintiff could have brought in his original suit.[13] This principle applies with equal force to alternate legal theories or jurisdictional bases. *See* Wright, Miller & Cooper, Federal Practice and Procedure § 4412 at 67-68 n.6 (Supp. 1990) ("a plaintiff who could invoke both federal and diversity jurisdiction should not be allowed to bypass the opportunity to secure a single adjudication of all claims").

As to the issue presented by the case at bar, in *Shaver* v. *F.W. Woolworth, Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert. denied*, 488 U.S. 856 (1988), the Seventh Circuit was presented with the identical factual scenario and reached the identical result. Like Kale, the plaintiff in *Shaver* filed a claim in federal court alleging that his termination violated the federal age discrimination act. He also brought several state law claims asserting only pendent jurisdiction. *Id.* at 1363.

As in the present case, the *Shaver* District Court dismissed the federal age claim on a motion for summary judgment because of the plaintiff's failure to file a timely charge of age discrimination and, like the case at bar, the court also dismissed the pendent state claims. Most importantly, like the case at bar, even though diversity had been available as an alternate basis of federal court jurisdiction, Shaver had failed to plead that form of jurisdiction. Rather, like Kale, he brought a second suit in state court alleging various state law claims. The second case was removed to federal court on the basis of diversity

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[13] *See Isaac* v. *Schwartz*, 706 F.2d 15, 17 (1st Cir. 1983), *citing Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974) (the issue is " 'not whether the plaintiff in fact argued his [alternative] claims in the [first] proceeding, but whether he could have' ").

jurisdiction. Thereafter, the *Shaver* defendant successfully moved for summary judgment on a variety of theories, including *res judicata*.

The Seventh Circuit affirmed, holding that because the plaintiff had "neglected to assert the existence of diversity jurisdiction in his prior action in order to pursue his breach of contract claims, both the strict test of and policy behind the res judicata doctrine bar[red] the [second] action." *Id.* at 1368. The Seventh Circuit held that a plaintiff must "allege in one proceeding all claims for relief arising out of a single core of operative facts, or be precluded from pursuing those claims in the future." *Id.* at 1365.[14]

Both *Shaver* and the First Circuit's opinion here stand for the proposition that a plaintiff will be required to plead all possible jurisdictional bases in a single proceeding, a requirement that comports fully with the long-accepted underlying principles of *res judicata*. As a federal court has no discretion to reject a claim properly based on diversity jurisdiction, requiring a plaintiff to assert such jurisdiction is consistent with the goal of *res judicata* to "'force a plaintiff to explore all the facts, develop all the theories, and demand all the remedies in the *first suit*.'" *Id.* at 1367, n.2 (citing 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4408 at 65 (1981) (emphasis in original)). *See also Cemer* v. *Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978) (court applies *res judicata* doctrine to bar later state court action seeking to claim breach of an employment contract where diversity was available in earlier federal action alleging age discrimination); *Harper* v. *Plastics* v. *Amoco Chemical Corp.*, 657 F.2d at 939 (*res*

[14] Petitioner asserts (again without authority) that even if *Shaver* is correct, it constitutes a new principle of law and should not be applied retroactively to the case at bar. *See Petition* at 21, 22. This contention plainly ignores the fact that the result here is not a modification of existing law or the adoption of a new rule of law, but an application of well established principles to a particular fact scenario.

judicata bars second lawsuit where a plaintiff had not included state law contract claims pursuant to discretionary *pendent* jurisdiction).

Petitioner's primary objection to *Shaver* appears to be that the case has not been relied upon for the point at issue.[15] Beyond the obvious fact that the number of subsequent citations is immaterial to the correctness of a holding, it is hard to imagine that the procedural posture presented by these cases is often presented to a court for resolution.

In the case at bar, moreover, the First Circuit correctly noted that while the circumstances of Kale's case were unusual, "the doctrine governing its resolution is quite mature and unencumbered by contradictions or ambiguities in respect to the question at hand. Rather than emanating from some dark interstice of the law, the district court's holding in *Kale II* was entirely predictable." 924 F.2d at 1167; *Pet. App.* at A-13. Similarly, the Restatement (Second) of Judgments § 25 comment e (1982) provides:

> When the plaintiff brings an action on the claim in a court, either state or federal, *in which there is no jurisdictional obstacle to his advancing both theories or grounds*, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action.

(Emphasis added.)

Thus, while the present issue is unlikely to present itself with any significant degree of frequency, the First Circuit's resolution of that issue was entirely consistent with the principles of *res judicata* discussed above.

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[15] *See Petition* at 19-21 (despite repeated searches, Petitioner states he is unable to find *Shaver* cited for the "point in issue here"). Petitioner does admit *Shaver* has been cited in numerous cases for the underlying principles which led to its result and has been commented on favorably by Wright & Miller.

B. *The First Circuit Correctly Concluded That Combined Was Under No Obligation To Appeal Judge Skinner's "Without Prejudice" Dismissal.*

Petitioner's argument concerning Combined's failure to appeal the *Kale I* dismissal is two-fold: first, that Combined somehow was required as a matter of law to appeal Judge Skinner's "without prejudice" dismissal in order to preserve its right to assert *res judicata* in the event that a then unknown future lawsuit was filed; and second, that Combined's failure to do so estopped it from advancing *res judicata* as a defense in *Kale II*. As such, his contention is nothing more than a last-ditch effort to shift to Combined the consequences of his own failure to plead a known form of jurisdiction which was apparent on the face of his original Complaint. *See Resp. App.* at A-1.

Petitioner's legal argument that Combined was obligated to appeal was squarely rejected by the First Circuit in its Order denying Petitioner's request for rehearing *en banc*.[16] *See* 924 F.2d at 1169; *Pet. App.* at A-38; *See also In re Public Service Co. of New Hampshire*, 898 F.2d 1, 2 (1st Cir. 1990) ("a party cannot appeal a judgment entered in its own favor"); *Bath Iron Works Corp.* v. *Coulombe*, 888 F.2d 179, 180 (1st Cir. 1989) (similar); and *Sierra Club* v. *Marsh*, 907 F.2d 210, 213 (1st Cir. 1990) ("appellant, having prevailed, could not have appealed [the order]"). Furthermore, even if Combined somehow could have appealed the *Kale I* dismissal, the authority cited by Petitioner does not provide any support for his

[16] Petitioner cites to authorities that permitted, under extremely limited circumstances, a prevailing party to appeal. *Petition* at 15 n.15. None of the cited cases is remotely similar to the case at bar. *See e.g., Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 332-33 (1980) (prevailing party permitted to appeal denial of class action certification which directly affected its "economic interest"). It defies logic, moreover, to suggest that Combined somehow was adversely affected by Judge Skinner's decision to dismiss the pendent state law claim.

argument that a prevailing party who fails to appeal thereby forfeits or waives all defenses otherwise available in subsequent suits.

II. The Issue Presented in This Action Is of Limited Significance: There Is No Conflict Among the Circuits; And Any Adverse Consequence to Petitioner Results Solely from His Own Pleading Choices.

While this Court's decision to grant a petition for writ of *certiorari* is discretionary, "[g]eneral public importance of the issues, and the need to secure uniformity of federal law must be the basic touchstones" of a decision to grant *certiorari*. 16 Wright, Miller & Cooper, Federal Practice and Procedure § 4004 at 509 (1977).[17] A consideration of these "touchstones" confirms the need to deny *certiorari*.

First, the decision of the First Circuit in *Kale II* is not in conflict with the decision of any other Circuit Court to have addressed the general or specific issue presented here. To the contrary, it is entirely consistent with the nearly identical case presented to and decided by the Seventh Circuit in *Shaver* v. *F.W. Woolworth Co.*, 840 F.2d at 1361. Indeed, recognizing the limited significance of these issues, this Court denied Shaver's petition for writ of *certiorari*. In the instant case, the First Circuit "enthusiastically" adopted the "impeccable" reasoning of the *Shaver* opinion. 924 F.2d at 1167; *Pet. App.* at A-12.

The inappropriateness of granting *certiorari* in the present action is demonstrated further by an examination of the unusual

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[17] *See also* Supreme Court Rule 10 ("[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor," including a decision by a United States Court of Appeals in conflict with the decision of another United States Court of Appeals on the same matter).

procedural histories of both the present action and *Shaver*. As both cases reflect, the issue presented by Petitioner will arise only where a plaintiff pleads one basis of jurisdiction (*e.g.*, pendent jurisdiction), but fails to plead a second form of jurisdiction (*e.g.*, diversity), which is known and available.

The issue is not only one which arises infrequently, but one which results entirely from Petitioner's own pleading choice. Petitioner argues that to "adopt the rule announced in *Shaver* would have the undesirable effect of *forcing* plaintiffs to plead diversity as well as pendent jurisdiction to keep their cases in federal court even after dismissal of their federal claims." *Petition* at 21. To the contrary, this result is not in any respect undesirable, since the basic policy underlying the doctrine of *res judicata* requires that a plaintiff assert all claims arising from a single transaction or occurrence in one lawsuit. The failure to do so results in the long-accepted forfeiture of all such claims. As the scope of the First Circuit decision is confined to those circumstances where a plaintiff knowingly fails to assert an alternate basis of jurisdiction in an earlier proceeding, it results in no more "unfairness" than that endured by any plaintiff precluded by *res judicata* from engaging in claim-splitting.

Conclusion.

For the foregoing reasons, this petition for *certiorari* must be denied.

Respectfully submitted,

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July 29, 1991

APPENDIX

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APPENDIX

UNITED DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE,
Plaintiff

CIVIL ACTION NO. 85-1840-S

v.

COMBINED INSURANCE COMPANY
OF AMERICA,
Defendant

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Introductory Statement

1. This is a civil action brought on behalf of a white male plaintiff. The plaintiff, who was fifty-one years of age at the time of his termination, seeks redress for discrimination on account of age, and for wrongful termination from his employment as well as intentional infliction of emotional distress.

Jurisdiction and Venue

2. Jurisdiction is based on the provisions of 28 U.S.C., § 1331, 28 U.S.C., § 1332, 28 U.S.C., § 1337 and 28 U.S.C., § 1343(4) as authorized by 29 U.S.C., § 621 *et seq*. Plaintiff also brings pendent state claims pursuant to the provisions of Rule 18(a) of the Federal Rules of Civil Procedure.

3. All conditions precedent to jurisdiction under 29 U.S.C., § 621 - *et seq*. have occurred or been complied with, to wit:

a charge of unlawful employment discrimination was filed with the United States Equal Employment Opportunity Commission and the Massachusetts Commission Against Discrimination; this action is initiated within two years of the alleged wrongful act.

4. The unlawful employment practices, which are the basis of this action, were committed within the Commonwealth of Massachusetts.

Parties

5. Plaintiff, Carl Kale, is a Massachusetts resident who resides at 293 Rindge Avenue, Cambridge, Massachusetts.

6. Defendant, Combined Insurance Company of America, is a Delaware corporation which, at the time of plaintiff's termination, did business in Massachusetts and in interstate commerce and did employ more than fifteen persons.

Statement of Facts

7. Plaintiff, who is fifty-three years of age, was first employed by the defendant's predecessor-in-interest, Hearthstone Corporation, on January 29, 1963.

8. Defendant remained with the defendant successor-in-interest as an employee of Combined Insurance Company of America, Hearthstone Division, at the time of the former's acquisition by the defendant.

9. During the term of his employment, plaintiff was employed as an accountant.

10. Plaintiff was terminated by the defendant's agents, allegedly for poor performance, on May 11, 1983.

11. Up until two years prior to his termination, plaintiff's performance had always been rated satisfactory.

12. Prior to his termination, plaintiff's supervisor, Bernard McCarthy, said that the defendant could obtain a younger person in plaintiff's position at one third less salary.

13. During the two years prior to his termination, plaintiff was subjected to disparate terms and conditions of employment including but not limited to the following: His performance appraisals, without justification, became poorer; his work was more closely scrutinized; and minor errors were magnified while similarly situated younger employees had nothing said to them.

14. Since plaintiff was the oldest of six accountants, he believes, and alleges, that the reason stated for his termination was pretextual and that his age was at least a factor in his termination. Indeed after his termination, plaintiff's duties were divided up among several younger employees.

First Claim For Relief

15. Plaintiff has been denied equal treatment and employment by the defendant because of his age in violation of 29 U.S.C., § 621-*et seq*.

Second Claim For Relief

16. Defendant, through its agents, intentionally and through extreme and outrageous conduct, caused severe emotional distress to plaintiff.

Third Claim For Relief

17. Plaintiff and defendant mutually agreed that the plaintiff would continue to be employed by the defendant from term to term upon satisfactory performance of his duties.

18. The methods by which defendant's agents were to have evaluated plaintiff's performance were governed by defendant company's personnel manual.

19. Plaintiff was never evaluated properly as unsatisfactory.

20. Plaintiff's dismissal on the basis of alleged poor performance was pretextual and unsubstantiated.

21. Plaintiff was always ready, willing and able to continue in the employment of the defendant and even offered to do so but the defendant, in terminating plaintiff's employment would not permit him to do so.

22. Defendant, in terminating plaintiff in order to benefit financially at his expense, breached the implied covenants of good faith and fair dealing which were contained in the employment relationship.

Right to Injunctive Relief

23. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for an injunction is, in respect to his age discrimination claim, plaintiff's only means of securing adequate relief.

Relief Requested

WHEREFORE plaintiff respectfully prays this Court advance the case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited, and upon such hearing to:

(1) Issue a permanent injunction enjoining defendants, their agents, successors, employees, attorneys and those acting in concert with them from engaging in each of the unlawful practices set forth in this complaint, and from continuing other practices shown to be in violation of the law.

(2) Grant such other and further relief as may be just and proper, including reinstatement and back pay.

(3) Award plaintiff, with respect to his second claim for relief, $1,000,000.00.

(4) Award plaintiff his costs in this action and reasonable attorney's fees.

Plaintiff Carl Kale hereby demands a trial by jury on all issues herein triable by right of jury.

CARL KALE
By his attorney,

Dated: May 8, 1985

Paul L. Nevins
40 Court Street,
Suite 926
Boston, MA 02108
(617) 227-2889

VERIFICATION

I, Carl Kale, plaintiff in this action, certify under the pains and penalties of perjury that I have read this complaint and that the allegations it contains are true to the best of my knowledge and belief.

_____

Carl Kale

Commonwealth of Massachusetts

MIDDLESEX, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 89-3017

CARL KALE,
Plaintiff

v.

COMBINED INSURANCE COMPANY
OF AMERICA,
Defendant

COMPLAINT
Jury Trial Demanded

Parties

1. The plaintiff, Carl Kale, is a natural person who resides in Middlesex County at 293 Rindge Avenue, Cambridge, Massachusetts.

2. The defendant, Combined Insurance Company of America ("Combined"), is a Delaware corporation which, at the time of the acts complained of, had a usual place of business in Norfolk County at Hearthstone Plaza, Brookline, Massachusetts.

Statement of Facts

3. Plaintiff Carl Kale was first employed by defendant Combined's predecessor-in-interest, Hearthstone Insurance Company of Massachusetts ("Hearthstone"), on January 29, 1963.

4. Hearthstone was a subsidiary of defendant Combined, which owned all shares of Hearthstone's stock other than shares held by Hearthstone's directors.

5. Combined chose all directors of Hearthstone, who were required to sell their stock in Hearthstone back to Combined upon leaving their directorships in Hearthstone.

6. At the time of his hiring by Hearthstone, Carl Kale was told by those who interviewed and hired him that if he worked out, he could expect to work there until he retired.

7. Carl Kale relied upon that representation in taking the job and in not seeking alternative employment.

8. During the term of his employment, Carl Kale was employed as an accountant. For most of that term, his title was that of internal auditor.

9. Hearthstone, by its oral promises to the plaintiff at the time he was hired, and the plaintiff by relying on those promises, accepting that employment, and performing satisfactorily, created a contractual right to continued employment of the plaintiff that would not be terminated except for just cause.

10. After the commencement of his employment with Hearthstone, Carl Kale was given additional assurances, both oral and written, including his Personnel Manual and other written materials, that he would not be discharged except for just cause.

11. Carl Kale was a full-time, permanent employee of Hearthstone, within the meaning of Hearthstone's Personnel Manual.

12. Hearthstone's Personnel Manual, policy statements, training sessions, and inspirational materials were prepared by Combined, and tailored as necessary for local Massachusetts law and custom.

13. Shortly after his employment with Hearthstone commenced, Carl was delegated the job of calculating Hearthstone's budgets.

14. As part of that job, Carl Kale was under standing orders to calculate across-the-board annual pay raises, with the specific percentage to use given to him each year by his supervisor.

15. This policy continued for over seventeen years, including after the merger of Hearthstone into Combined, as described below.

16. Carl Kale relied on this policy in remaining in his job and not seeking other employment.

17. Approximately fifteen years after Carl Kale's employment commenced, Hearthstone Insurance Company of Massachusetts was merged into its parent corporation, Combined, the defendant.

18. The defendant retained substantially all, and at least the majority, of Hearthstone's employees.

19. The defendant succeeded to Hearthstone's existing business and accounts.

20. The defendant, in the manner of its acquisition and carrying on of Hearthstone's business and the retention of its employees, succeeded to its contractual obligations, including its contractual obligations to its employees.

21. When Hearthstone Insurance Company of Massachusetts was merged into the defendant, Carl Kale continued as an employee of the defendant's Hearthstone Division.

22. After the merger of Hearthstone Insurance Company of Massachusetts into the defendant, Carl Kale was given additional assurances, both oral and written, by the defendant, including the Personnel Manual and other written materials given to him by the defendant, that he would not be discharged except for just cause.

23. These assurances and written materials were substantially identical to those previously given to Carl Kale by Hearthstone.

24. In reliance on all those assurances, Carl Kale remained in his job and did not seek alternative employment while he was still young enough to do so.

25. Carl was a full-time, permanent employee of Combined, within the meaning of Combined's Personnel Manual.

26. Carl Kale's performance in his job was always satisfactory or better.

27. Until March of 1981, Carl Kale's performance had always been rated satisfactory or better.

28. Carl Kale never received a properly conducted performance review that indicated unsatisfactory performance.

29. Starting in March of 1981, Carl Kale began to be subjected to harassment by his immediate supervisor in the form of frequent unfounded criticism, both privately and publicly, in the apparent hope that this would force his resignation.

30. After that point in time, Carl Kale was never again given even a cost-of-living raise, even when other employees in the company were receiving raises.

31. Efforts to force Carl Kale to resign were motivated by the defendant's desire to benefit financially by having his work done by younger, lower paid employees, and by diminishing the value of his vested pension rights.

32. On May 11, 1983, Carl Kale was told by agents of the defendant that his employment by the defendant was terminated, effective that same day.

33. At the time of his termination, Carl Kale's salary was twenty thousand dollars ($20,000) per year.

34. Carl Kale has always remained ready, willing and able to work.

35. The defendant's agents prevented Carl Kale from continuing in his employment by the defendant.

36. Although he made diligent efforts to find other employment in his profession as an accountant after his termination by the defendant, Carl Kale was unable to do so.

Count I

Declaratory Judgment: Existence of Right to Continued Employment

37. The allegations of paragraph 1 through 36 are hereby incorporated by reference as if fully set forth herein.

38. The plaintiff seeks a declaratory judgment by this court that by his reliance in accepting and continuing his employment with the defendant, based upon the oral and written assurances he received from the defendant, he became entitled to a legitimate expectation of continued employment by the defendant which was terminable only on the basis of just cause.

Count II

Declaratory Judgment: Defendant Bound by Predecessor's Contract Creating Right to Continued Employment

39. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

40. The plaintiff seeks a declaratory judgment by this court that (a) by his reliance in accepting and continuing his employment with the defendant's predecessor-in-interest, Hearthstone Insurance Company of Massachusetts, based upon the oral and written assurances he received from Hearthstone, he became entitled to a legitimate expectation of continued employment with Hearthstone which was terminable only on the basis of just cause, and that (b) the manner of the defendant's acquisition of the business of Hearthstone made it subject to the plaintiff's expectation of continued employment by the defendant terminable only on the basis of just cause.

Count III

Breach of Implied Contract: Employment Manuals and Other Writings

41. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

42. The defendant, in discharging the plaintiff without just cause, breached his contract of employment that may be found or implied from the language of the defendant's (and its predecessor-in-interest's) employment manuals and other written materials, and his reliance thereon and acceptance of that contract by performance, whereby he has suffered reasonably foreseeable harm in the form of lost income and fringe benefits, the loss of business and personal reputation, and other financial losses.

Count IV

Breach of Oral Contract

43. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

44. The defendant, in discharging the plaintiff without just cause, breached his contract of employment that may be found or implied from the language of the defendant's (and its predecessor-in-interest's) oral assurances to him, and his reliance thereon and acceptance of that contract by performance, whereby he has suffered reasonably foreseeable harm in the form of lost income and fringe benefits, the loss of business and personal reputation, and other financial losses.

Count V

Breach of Contract of Employment Terminable Only for Just Cause

45. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

46. The defendant, in discharging the plaintiff without just cause, breached his contract of employment that may be found or implied from the language of the defendant's (and its predecessor-in-interest's) oral assurances, employment manuals and other written materials, and his reliance thereon and acceptance of that contract by performance, whereby he has suffered reasonably foreseeable harm in the form of lost income and fringe benefits, the loss of business and personal reputation, and other financial losses.

Count VI

Negligent Breach of Implied Covenant of Good Faith and Fair Dealing and of Specific Contractual Rights

47. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

48. The defendant owed the plaintiff the duty not to terminate his employment without just cause, arising out of the oral and written assurances he had been given by the defendant and its predecessor-in-interest and his reliance thereon and acceptance of that contract by performance, and from the implied covenant of good faith and fair dealing that is a part of all contracts.

49. The defendant, through its agents, negligently violated its duty not to terminate him without just cause.

50. As a direct and proximate result of that negligent violation of the defendant's duty to the plaintiff not to terminate his employment without just cause, the plaintiff has suffered reasonably foreseeable harm in the form of lost income and fringe benefits, the loss of business and personal reputation, and other financial losses.

Count VII

Promissory Estoppel

51. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

52. The defendant, by its (and its predecessor-in-interest's) oral assurances, employment manuals and other written materials, and the plaintiff's his reliance thereon and acceptance of that contract by performance, is estopped from denying that the plaintiff was entitled to employment terminable only for just cause.

53. The defendant, in discharging the plaintiff without just cause, breached its promise to the plaintiff, whereby he has suffered reasonably foreseeable harm in the form of lost income and fringe benefits, the loss of business and personal reputation, and other financial losses.

Ad Damnum

WHEREFORE, plaintiff Carl Kale seeks, as damages under each of the above Counts, $120,000 in lost wages from the time of his discharge to date, plus interest, plus such other elements of harm which are stated in those counts but the value

of which cannot be fixed before trial, inlcuding but limited to employment after the date of this Complaint.

Respectfully submitted,

CARL KALE

By his attorneys,

Paul L. Nevins
Philip R. Olenick
40 Court Street — Suite 926
Boston, Massachusetts 02108
(617) 227-2889/720-4100
BBO#369330 (PLN); 378605 (PRO)

Verification of Ad Damnum

For purposes of compliance with the provisions of § 13B of chapter 231 of the General Laws, the plaintiff states, under oath, that with respect to the money damages claimed in his Complaint, he has calculated, as liquidated damages, the specific figure listed in the *Ad Damnum* (which does not include other claims the value of which cannot be fixed before trial).

The specific figure listed in the Ad Damnum was calculated by multiplying his lost annual salary of $20,000 per year, by six years, yielding a figure of $120,000.

Signed under the pains and penalties of perjury, this 27th date of April, 1989.

Carl Kale

Verification of Complaint

The plaintiff states, under oath, that he has personal knowledge of the facts stated in the preceding *Complaint,* and that to the best of his information and belief the facts stated therein are true.

Signed under the pains and penalties of perjury, this 27th day of April, 1989.

Carl Kane